

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEITH L. HINDMAN, and
STEVEN M. FEATHERKILE,

Defendants.

NOS. CR-07-096-RHW-1
CR-07-096-RHW-2

**ORDER DENYING MOTIONS TO
DISMISS, SUPPRESS**

A pretrial conference was held on July 22, 2008. Defendant Keith Hindman was present and represented by Mark Vovos; Defendant Steven M. Featherkile was present and represented by J. Jarrette Sandlin. The Government was represented by Assistant United States Attorney Joseph Harrington. Before the Court are Defendant Keith Hindman's Motion *in Limine* (Ct. Rec. 60), Motion for Suppression of Evidence Pursuant to Rule 12 (Ct. Rec. 61), and Motion to Dismiss Case (Ct. Rec. 66). Defendant Steven Featherkile filed a notice to join in his co-Defendant's motions (Ct. Rec. 71).

I. Motion to Suppress

Defendant moves the Court for an order excluding evidence and statements on the grounds that they were obtained as a result of an illegal search and seizure. Defendant submits the search warrant affidavit in this matter did not establish probable cause to search.

A. Facts

Defendant Hindman is a doctor of osteopathic medicine who operated the

1 Shepherd's Staff Foundation Medical Clinic in Deer Park, Washington. Among
2 other things, Dr. Hindman treats patients for pain management. He is licensed in
3 the State of Washington and registered with the Drug Enforcement Agency for the
4 purpose of prescribing prescription medications. Defendant Featherkile is a
5 licensed physician assistant supervised by Dr. Hindman.

6 The FBI began an investigation in January 2005 in conjunction with other
7 federal and state agencies. The investigation concentrated on two general areas:
8 whether Defendants have caused false or unsubstantiated claims for reimbursement
9 of Schedule II controlled substances to be submitted to government and private
10 insurance companies in violation of 18 U.S.C. § 1347; and whether Defendants
11 issued prescriptions for Schedule II controlled substances, such as Methadone,
12 OxyContin, and Oxycodone, without a legitimate medical purpose and/or outside
13 the normal course of medical practice, in violation of 21 U.S.C. § 841.

14 Based on interviews of patients and cooperating witnesses and on the
15 insurance investigation, the FBI sought search warrants for both of the premises of
16 Shepherd's Staff Foundation Medical Clinic as well as for Dr. Hindman's
17 residence and his storage unit. Defendant submits that while entering the premises
18 at 855 S. Main, the FBI made another application for a search warrant for the
19 adjoining premises at 857 S. Main. Defendant states that nothing was seized from
20 the storage unit.

21 The items sought in the warrant included patient records including patients
22 not suspected to be included in any of the alleged crimes being investigated, as
23 well as computer data. The warrant was executed on September 22, 2005. The
24 warrant requested the seizure of 270 selected patient files.

25 **B. Analysis**

26 Defendant submits this was an over-broad and unnecessary request without
27 probable cause as to the specific patients requested. Defendant also argues that the
28 information that the FBI had from confidential cooperating witnesses was stale,

1 and there was no nexus to the location of the crime or to the specific patients. For
2 these reasons, Defendant states the evidence seized should be suppressed.

3 The Government responds that the affidavits were not lacking a nexus to an
4 articulated crime, but that the affidavits instead described the investigation and the
5 potential violations of law being investigated. The affidavit also explains that
6 Defendant is a contractual medical provider for state and federal benefits programs
7 and that there was evidence that he changed charts in preparation for a Medicare
8 audit and an L&I request for charts in 2004 and 2005. There is also evidence in the
9 affidavit that Defendant illegally billed prescriptions in relation to the “Celebrate
10 Recovery” program he offered on Sunday evenings for recovering addicts.

11 As to the allegation of overbreadth, the Government submits the affidavits
12 identified specific patient files that represented a sampling of claims submitted to
13 the identified benefits programs along with patients who exhibited high doses of
14 pain medications. The Government submits there was probable cause to search for
15 the items listed in the warrants, and that the warrant objectively described the items
16 to be searched and seized with specificity and sufficiently restricted the discretion
17 of the agents executing the search.

18 As to the staleness claim, the Government maintains the affidavits were
19 based on information obtained from 2002 to April 2005 and that the information
20 was not stale.

21 Last, the Government states that, should the Court determine the search
22 warrants in this case were not valid, the evidence should still be admitted pursuant
23 to the good faith exception outlined in *United States v. Leon*, 468 U.S. 897 (1984).
24 The Government states that the affiant did not mislead the magistrate; the
25 magistrate did not wholly abandon her judicial function; the affidavit contained
26 substantial evidence toward a finding of probable cause; and the warrant was not
27 facially deficient.

28 **1. Probable Cause**

1 A warrant may not issue absent a showing of probable cause to believe that
2 the legitimate object of a search is located in a particular place. *See United States*
3 *v. Adjani*, 452 F.3d 1140, 1145 (9th Cir. 2006). Here, Defendant argues there was
4 not probable cause as to the specific patients identified in the warrant affidavit and
5 that the warrants were overbroad. The affidavit outlines the evidence that shows
6 that Defendant was the top prescriber of medication in Washington and the second
7 highest prescriber of Oxycodone. It includes information from a pharmacist about
8 his unusual prescribing habits along with information from several witnesses
9 stating that Defendants prescribed excessive amounts of drugs.

10 Defendant argues that the affidavit contains only conclusory statements and
11 mere suspicions of people not educated in pain management, and that this cannot
12 form the basis of probable cause. However, the “probable cause standard . . . is a
13 practical, nontechnical conception. [It] is a fluid concept—turning on the
14 assessment of probabilities in particular factual contexts—not readily, or even
15 usefully, reduced to a neat set of legal rules.” *Id.* (internal quotation marks and
16 citations omitted). From the extensive information contained in the affidavit from
17 various sources, the Court finds the affidavit does establish probable cause to
18 search the locations identified for evidence of the enumerated crimes of health care
19 fraud and distribution of controlled substances.

20 2. Particularity

21 The Fourth Amendment contains a specificity requirement which is meant to
22 prevent officers “from engaging in general, exploratory searches by limiting their
23 discretion and providing specific guidance as to what can and cannot be searched
24 and seized.” *Adjani*, 452 F.3d at 1147. “[T]he level of detail necessary in a
25 warrant is related to the particular circumstances and the nature of the evidence
26 sought.” *Id.* When determining whether a warrant is sufficiently particular, the
27 Court should consider the following factors:

- 28 (1) whether probable cause exists to seize all items of a particular type
described in the warrant; (2) whether the warrant sets out objective

standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

Id. at 1148.

Here, the warrants provided the identity and nature of the items to be seized and limited the search to evidence of the specific, identified crimes. Additionally, the lengthy statement of probable cause detailed the alleged crime and Defendants' alleged unlawful conduct, and this acted to further limit the officers' discretion. The warrant also set out objective standards by which officers could differentiate items to be seized; in fact, the warrant identified specifically the patient files subject to seizure. The Government described the items to be searched and seized with particularity given the nature of the crime and the evidence it possessed at that time.

3. Staleness

A warrant is not supported by probable cause if it is based on stale information that renders unlikely the continued existence of seizable materials in the place to be searched. No set time limit renders information stale. "Staleness must be evaluated in light of the particular facts of the case and the nature of the criminal activity and property sought." *United States v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991).

Evidence that is sustained and perpetuated over a period of time can defeat the claim of "staleness." *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992) (finding that evidence gathered over a period of nearly four years was not stale). *See also United States v. Lacy*, 119 F.3d 742, 745-46 (9th Cir. 1997) ("The information offered in support of the application for a search warrant is not stale if 'there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises.'").

Medical records fall under the exception for evidence that is perpetuated over a period of time. Additionally, the Court finds that the time the Government

1 spent gathering the information was not overly long, nor was the information out
2 of date.

3 The Court therefore denies Defendant's motion to suppress, for the search
4 warrant affidavit adequately established probable cause to search the premises,
5 including the location added to the warrant after the initial search was executed.

6 **II. Motion to Dismiss**

7 Also before the Court is Defendant's Motion for an Order (1) Declaring 21
8 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 Unconstitutional for Vagueness; and (2)
9 Dismissing Counts 1-14 for Failure to State an Indictable Offense (Ct. Rec. 66). In
10 this motion, Defendant argues that the charges under 21 U.S.C. § 841 should be
11 dismissed because it is not illegal for a licensed physician to dispense pain
12 medications. He states that § 841(a)(1) is unconstitutionally vague both facially
13 and "as applied" to Defendant. Defendant argues that a physician looking at the
14 statute would not be able to determine what actions are not for a legitimate medical
15 purpose and/or outside the scope of professional practice.

16 The Government responds that § 841 is part of a comprehensive act that has
17 been consistently upheld against constitutional attack. *See United States v.*
18 *Visman*, 919 F.2d 1390, 1393 (9th Cir. 1990), *cert. denied* 423 U.S. 1031 (1991).
19 In fact, the Supreme Court affirmed the conviction of a licensed physician under §
20 841(a)(1) in *United States v. Moore*, 423 U.S. 122, 142 (1975). The Ninth Circuit
21 has likewise examined the phrase "outside the scope of professional practice" as
22 used in § 841(a)(1) and found no constitutional infirmity. *United States v.*
23 *Rosenberg*, 515 F.2d 190, 197 (9th Cir. 1975).

24 Considering the consistent upholding of this statute by the courts, the
25 Government submits Defendant's motion should be denied. Additionally, whether
26 Defendant's conduct falls outside the bounds of professional conduct is a question
27 for the jury to decide under *Rosenberg*. 515 F.2d at 199.

28 In his reply, Defendant Hindman appears to concede that § 841 is

1 constitutionally applied to licensed physicians, but he argues that good faith is
2 essential and relevant to a physician's violation of § 841. He complains that the
3 lack of good faith is not alleged in the Indictment, nor is it in any memoranda,
4 discovery, or other facts provided by the prosecution. Hindman cites to *United*
5 *States v. Hayes*, 794 F.2d 1348 (9th Cir. 1986), in which the Ninth Circuit found
6 no error in the jury charge that required them to determine that the physical act of
7 prescribing was other than in good faith, and that defined good faith as "an honest
8 effort to prescribe for a patient's condition in accordance with the standard of
9 medical practice generally recognized and accepted in the country." *Id.* at 1351.

10 This argument is best considered in the light of jury instructions, and it does
11 not apply to the question of whether § 841 is constitutional. As to the application
12 of this argument to Defendant's motion to dismiss for failure to state an indictable
13 offense, the Ninth Circuit has not addressed this specific argument, but the Fourth
14 Circuit has in *United States v. Daniel*, 3 F.3d 775, 777-78 (4th Cir. 1993). That
15 court interpreted the statute's elements as (1) a knowing or intentional attempt to
16 distribute or dispense (2) a substance known to be controlled (3) in a way not
17 authorized by this subchapter. *Id.* at 778. The "lack of good faith" requirement
18 falls under the third element, and with respect to physicians that element requires
19 proof that the charged conduct falls outside the boundaries of the registrant's
20 professional practice. *Id.* Here, the Indictment's allegations that the distributions
21 were prescribed "for other than legitimate medical purposes and outside the course
22 of professional practice" satisfy that element. *See id.*

23 Defendant Featherkile also filed a reply to this motion in which he raises a
24 novel argument using the reasoning applied in *Gonzales v. Oregon*, 546 U.S. 243
25 (2006). Featherkile argues that to indict a physician under § 841, the federal
26 government must have the power to supersede state medical standards of care for
27 practicing physicians and physician assistants. Featherkile submits that the
28 Supreme Court's holding in *Gonzales* shows that the federal government does not

1 have that power, so the Indictment must be dismissed. The Government relies, as
2 stated above, on the Supreme Court's decision in *Moore*, 423 U.S. at 135, to argue
3 that the federal government does have the power to regulate physicians'
4 prescriptions of certain scheduled drugs.

5 *Gonzales v. Oregon* settled a declaratory claim brought by the State of
6 Oregon regarding the federal government's enforcement or application of the
7 United States Attorney General's interpretive rule indicating that physicians who
8 assist the suicide of terminally-ill patients pursuant to the Oregon Death with
9 Dignity Act would violate the federal Controlled Substances Act (CSA). 546 U.S.
10 243, 248-249 (2006). The interpretive rule stated that "using controlled substances
11 to assist suicide is not a legitimate medical practice and that dispensing or
12 prescribing them for this purpose is unlawful under the CSA." *Id.* at 249. The
13 Supreme Court was asked to decide whether the interpretive rule, which basically
14 was an "attempt to define standards of medical practice[,]” was a legitimate
15 exercise of the Attorney General's powers. *Id.* at 259. The Court ultimately
16 concluded that it was not. *Id.* at 274-75 (“[W]e conclude the CSA's prescription
17 requirement does not authorize the Attorney General to bar dispensing controlled
18 substances for assisted suicide in the face of a state medical regime permitting such
19 conduct.”).

20 Notably, the Supreme Court in *Gonzales* discusses its holding in *Moore* and
21 does not disturb its conclusion that § 841 legitimately “bars doctors from peddling
22 to patients who crave the drugs for . . . prohibited uses.” *Id.* at 274 (citing *Moore*,
23 423 U.S. at 135). The Ninth Circuit and other courts have also upheld the
24 application of the CSA to physicians since the *Gonzales* opinion was issued. *See*,
25 *e.g.*, *United States v. Feingold*, 454 F.3d 1001, 1011 & n.2 (9th Cir. 2006); *United*
26 *States v. Hurwitz*, 459 F.3d 463, 476-82 (4th Cir. 2006). Featherkile's arguments
27 regarding the CSA's application to practitioners who treat patients suffering from
28 chronic pain and the standard of care that may apply to those practitioners do not

1 go to the constitutionality or sufficiency of the Indictment. Rather, they are
2 arguments that apply when composing jury instructions and when arguing before
3 the jury itself. Therefore, the Court denies Defendant's motion to dismiss.

4 **III. Motion in Limine**

5 Defendant has also filed a motion *in limine* (Ct. Rec. 60). Defendant asks
6 the Court to exclude evidence in thirty categories, many of which are covered by
7 the Federal Rules of Evidence. The Court denies this motion at this time, and
8 gives Defendant leave to renew the motion closer in time to the trial.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendant Keith Hindman's Motion *in Limine* (Ct. Rec. 60) is **DENIED**
11 **with leave to renew.**

12 2. Defendant Hindman's Motion for Suppression of Evidence Pursuant to
13 Rule 12 (Ct. Rec. 61) is **DENIED.**

14 3. Defendant Hindman's Motion to Dismiss Case (Ct. Rec. 66) is **DENIED.**

15 4. Defendant Steven Featherkile's notice to join in his co-Defendant's
16 motions (Ct. Rec. 71) is **GRANTED.**

17 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
18 Order and to provide copies to counsel.

19 **DATED** this 25th day of July, 2008.

20 *S/ Robert H. Whaley*

21 ROBERT H. WHALEY
22 Chief United States District Judge

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